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Written statement* submitted by the International Bar Association, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is hereby circulated in accordance with Economic and Social Council resolution 1996/31.

[2 February 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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The promotion and protection of human rights in light of the Universal Periodic Review mechanism: challenges and opportunities

High-level panel with United Nations agencies on human rights mainstreaming

Mr President,

On the occasion of the high-level panel with United Nations agencies, the International Bar Association's Human Rights Institute (IBAHRI) submits for your consideration the key findings of its three reports on the impact of the Universal Periodic Review (UPR) on enhancing human rights in the administration of justice and protection of legal and judicial professionals (2016);[1] human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons (2016);[2] and human rights in juvenile justice systems (upcoming, 2018).[3]

1. Key findings

1.1 The role of the Universal Periodic Review in advancing human rights in the administration of justice (2016)

The IBAHRI found that international recommendations made at the UPR on the administration of justice still need to be lifted to the level of protection spelled out in international standards, especially the UN Basic Principles on the Role of Lawyers, the UN Basic Principles on the Independence of the Judiciary and the UN Guidelines on the Role of Prosecutors. These standards and content have hardly been addressed at the UPR.

More specifically:

- UPR recommendations still insufficiently address the role of judges, lawyers and prosecutors, or the threats they face, as extensively documented by the Special Rapporteur on the independence of judges and lawyers. Significantly, these recommendations often make no reference to relevant UN standards.
- Recommendations relating to the independence of judges are often too vague to be an effective response to the shortcomings of any given jurisdiction. Serious issues in the appointment and removal of judges are mostly ignored.
- The independence of lawyers was considered in fewer than 100 of the 38,000 UPR recommendations spanning from 2008 to 2016.
- Prosecutorial independence is addressed in less than ten per cent of the recommendations calling upon states to effectively investigate or prosecute rights violations.
- Guarantees for legal professionals' rights to freedom of expression, assembly and association are barely addressed. This fails to reflect the key role that self-governing organisations of legal professionals should play in upholding human rights and the rule of law, the independence of the legal profession and law reform processes.
- The UPR recommendations have barely mentioned until now the specific status and need for protection of legal professionals.

1.2 Sexual orientation, gender identity and expression, and sex characteristics at the Universal Periodic Review (2016)

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1 IBAHRI, *The role of the Universal Periodic Review in advancing human rights in the administration of justice* (IBA, 2016).
2 IBAHRI, *Sexual orientation, gender identity and expression, and sex characteristics at the Universal Periodic Review* (IBA, 2016).
3 IBAHRI, *The role of the Universal Periodic Review in enhancing human rights in juvenile justice* (IBA, 2018).

The IBAHRI report found that:

- More and more sexual orientation, gender identity and expression, and sex characteristics (SOGIESC) and LGBTI recommendations have been made over the 22 UPR sessions considered in the IBAHRI report. If SOGIESC issues are not in the top list of issues addressed, a great percentage of countries putting the LGBTI community in a critical situation have been addressed. More than half of the recommendations made between 2008 and 2015 are close to qualifying as specific, measurable, actionable, relevant and time-bound recommendations.
- Recommended calls to action mostly lie in law reform and, to a lesser extent, awareness-raising and training measures. Great emphasis has been placed on the principle of non-discrimination, the right to security, freedom from arbitrary detention and the right to privacy, through the decriminalisation of consensual same-sex sexual relationships. Most remarkably, the recommendations related to the right to found a family, addressing both partnerships and the right to adopt, constitute the fourth main category of rights addressed. The UPR constitutes in that respect the most progressive arena for the protection of the LGBTI community at the international level.

At the same time, the main shortcomings and challenges ahead for the UPR to gain impact on the ground were found to be the following:

- The limited number of recommendations addressing the death penalty based on sexual orientation and quasi-absence of recommendations addressing torture and degrading and inhuman treatment committed against LGBTI persons remains among the most striking gaps. So is the extremely low level of acceptance of decriminalisation of consensual same-sex relationships, at less than six per cent, as well as the absence of reference to children and youth in the SOGIESC recommendations.
- Besides, a number of issues remain to be specifically addressed at the UPR, like gender identity, expression and sex characteristics.

1.3 The role of the Universal Periodic Review in enhancing human rights in juvenile justice (2018)

The upcoming IBAHRI report finds that, over its first two cycles:

- The UPR has consolidated some of the major principles of the UN Convention on the Rights of the Child (CRC) and, some principles of the Beijing and Havana Rules. This is the case for the establishment of a juvenile justice system and a minimum age of criminal responsibility; the principle of deprivation of liberty as a last resort and for the shortest time possible; the principle of separation of children from adults in detention; and the non-imposition of the death penalty for crimes committed by persons under the age of 18.
- The UPR has gone beyond existing international legal frameworks and drew additional attention to a form of inhumane sentencing, on which international condemnation is often limited, life imprisonment with or without parole.
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The main shortcomings and challenges ahead for the UPR to gain impact on the ground were found to be the following:

- The UPR has fallen short of international standards insofar as it has, to date, hardly addressed the prevention aspect and the diversion process placed at the core of juvenile justice systems in the UNCRC. It also falls short of the guarantees of a fair trial and procedural rights to which children are entitled when deprived of their liberty. After those calling for the abolition of inhuman sentencing, recommendations relating to fair trial rights were the least accepted.
- Within this, the fundamental role of lawyers in representing and defending children in judicial processes has been particularly overlooked. Children are specifically dependent on legal assistance in order to understand the juvenile justice process and be represented so that their rights are respected.

2. IBAHRI's recommendations for improvement of the UPR process

The IBAHRI calls upon the Human Rights Council (HRC) as well as states to ensure that, in the third cycle of the UPR:

- The role of judges, lawyers and prosecutors receives the heightened attention that it is due, as recognised by the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers and the UN Guidelines on the Role of Prosecutors.
- UPR recommendations build upon the current international human rights framework and borrow the agreed international human rights language.
- The process aims at sharing the best practice among states and other stakeholders, as per HRC Resolution 5/1 (2007), para 4(d). Only a few states have echoed the recommendations and good practices identified by the Special Rapporteurs in the administration of justice. Positive progress, for instance, with respect to the protection of the rights of LGBTI persons and diversion measures for children, is currently hardly accessible.
- Primary stakeholders are involved insofar as their engagement constitutes the best guarantee of impact on the ground. For instance, the presence of LGBTI groups in this process has been significant, including local LGBTI groups who can take ownership of the recommendations and follow-up. Conversely, the involvement of legal and judicial professionals and children's groups is still lacking.
- A monitoring system of the UPR recommendations, consistent with a holistic monitoring of the country's human rights obligations and Sustainable Development Goals on the ground. Most notably, the absence of implementation or reporting guidelines in the area of the administration of justice is a peculiar problem that goes beyond the UPR. Notwithstanding the UN Rule of Law Indicators, there is currently no UN monitoring system measuring adherence to international standards on the independence of justice. The IBAHRI therefore encourages states under review to use the UN Rule of Law Indicators and set up a monitoring system based on the UN Basic Principles and Guidelines to monitor progress in realising access to justice for all, as targeted by Sustainable Development Goal 16.